trust on the remaining two charges. To support such a charge there must be evidence of an express or implied entrustment of the property concerned by the complainant to the accused. In the case of the money given to accused on 21st February, 1949, $1,250 in return for his cheque, there is no acceptable evidence that it was entrusted to him to pay into the bank in order to meet his cheque. It is clear from the evidence of complainant and Chin Ten Guen that the cash was handed to accused for his cheque for purposes of convenience of carriage and that there was no express trust or implied trust that that money would be made available to meet accused's cheque for $1,250. The only implication was that the accused's banking account would be solvent enough to meet the cheque when it was presented for payment.

Similarly with the cheque for $1,000 of 23rd February. It is clear from the evidence of the complainant himself that he knew that accused was going to obtain money to make good the $1,250 by visiting Singapore, and yet he handed him as an extra security $1,000 cash for another cheque. It cannot be said that he entrusted accused with this money to meet the $1,250 cheque already dishonoured.

For these reasons I am of opinion that, though a civil claim may lie against the accused on behalf of the complainant, the evidence does not disclose any criminal breach of trust. As to the learned Deputy Public Prosecutor's suggestion that the evidence may disclose other offences in regard to these sums, in my view there is not enough evidence of the criminal intention of accused at the time of the transactions to warrant a finding of guilty by the Court.

On the whole case it is clear that owing to the illegality of the misjoinder of charges and the absence of evidence as to an entrustment, the appeal must be allowed and the conviction quashed and the sentence set aside.

Appeal allowed.

KOK HONG LEONG KONGSI & 5 OTHERS v. SEOW KAH CHENG & ANOTHER.

[Court of Appeal (Willan, C.J., Spenser-Wilkinson, and Briggs, J.J.) March 9, 1950]

[F.M. — Civil Appeal No. 12 of 1949]

Partnership — Partner defending action brought against firm — Liability of.

In this case the respondents had successfully defended a suit brought against a partnership firm. The action against the firm was for the sum of $4,246.50 as damages for breach of an agreement to charter a motor boat and costs. The respondents defended the action on two grounds, first that the plaintiff in the action had suffered no damage and secondly that the plaintiff in the action had acted fraudulently and in collusion with the other partners of the firm, the appellants in this appeal, that the charter was not a genuine transaction and there was in effect no contract to be broken and so no breach. The respondents succeeded on the first ground and failed on the second and judgment was given for the plaintiff in the action for $1/- damages, each party to pay its own costs. In a partnership action for a declaration of dissolution, accounts and other relief an order was made that the solicitor and client costs of the respondents in defending the action against the firm be taxed and paid out of the assets of the firm subject to a limit of $4,246.50 The appellants appealed against this order.

Held, that as the respondents had by defending the action caused partnership assets to be preserved, they were entitled to receive from the partnership the expenses incurred by their defence and they were therefore entitled to receive the sum awarded to them by the order appealed from.

CIVIL APPEAL from an Order of Jobling, J.

R. D. Hume and *Ong Huck Lim* for the appellants.

E. A. de Buriatte for the respondents.

Cur. Adv. Vult.

Briggs, J. : — This is an appeal from an order of Mr. Justice Jobling made the 20th October, 1949, in the course of Penang Civil Suit No. 105 of 1947, a partnership action for a declaration of dissolution, accounts and other relief relating to the firm of Chop Teik Seng Leong, wherein the respondents are plaintiffs and the appellants defendants. The plaintiffs had on the 24th December, 1948, applied by summons in chambers in that suit for an order that their solicitor and client costs of defending Penang Civil Suit No. 126 of 1947, between Tan Kup plaintiff and Chop Teik Seng Leong defendants, be taxed and paid out of the assets of Chop Teik Seng Leong, and the defendants (other than the defendant Ch'ng Tian Seong) had on the 3rd May, 1949, moved in the same suit for assessment of damages under the usual undertaking as to damages given by the plaintiffs when they obtained an *ex parte* injunction against Tan Ghee Chuan, the 5th defendant, on 22nd October, 1947, the day on which the suit was filed. These two matters were heard together and the plaintiffs succeeded on both, subject to a limit of $4,246.50 as regards the payment of costs. The defendants appealed against both parts of the decision, but abandoned their appeal as regards the damages. The appeal is now only against that part of the order allowing taxation of the plaintiffs' costs incurred in Suit No. 126, and payment thereof out of partnership assets subject to a limit of $4,246.50.

It was alleged by the plaintiffs that the defendants had undertaken not to send out of the jurisdiction a

certain motor boat No. P.C. 2340, which was registered in the name of Tan Ghee Chuan and was one of the principal assets of the partnership; that, in breach of such undertaking, they obtained a port clearance for the boat to sail to Rangoon without passengers or freight; that they purported to charter the boat to Tan Kup, later the plaintiff in Suit No. 126; and that the charter was not a genuine charter, but a collusive device to remove the boat from the jurisdiction and thereby defeat or delay the claims of the plaintiffs in the winding up of the firm. We are informed by counsel that it is now *res judicata* between these parties that their partnership was dissolved on 25th September, 1947. It is also *res judicata* that the plaintiffs are not liable to the defendants in damages for obtaining the *ex parte* injunction, the effect of which was to keep the boat within the jurisdiction and to prevent the performance of the agreement of charter. There has been no express decision as between the present parties whether the defendants did collude with Tan Kup as alleged or not. That question may fall to be decided in future and we express no opinion on it.

Tan Kup claimed against the partnership in Suit No. 126 the sum of $4,246.50 as damages for breach of the agreement to charter and costs. The partners other than the present respondents refused to defend the suit. They gave as their reason for this that, as the respondents had obtained the injunction, they were the exclusive authors of any damage to Tan Kup and would be obliged to relieve the other partners from any liability therefor. Whether this was the true reason may be doubted, but is immaterial.

The respondents defended Suit No. 126 on behalf of the partnership on two principal grounds, first, that the plaintiff had suffered no damage and, secondly, that the plaintiff had acted fraudulently and in collusion with the present appellants, that the charter was not a genuine transaction and that there was in effect no contract to be broken, and so no breach. They succeeded on the first ground and failed on the second, and judgment was given for Tan Kup for $1/- damages, each party to pay its own costs. Bostock Hill, J. found that no fraud or collusion had been established as against Tan Kup, but thought that Tan Ghee Chuan may well have executed the agreement of charter not as an honest, normal transaction, but as a device to get the boat out of the jurisdiction in fraud of the respondents.

Jobling J. considered that the respondents "in effect succeeded in establishing the principal grounds" of their application for the injunction, and rejected the suggestion that the charter was to their knowledge made in the ordinary way of business.

In these circumstances it could hardly be suggested that the respondents were wrong to defend Tan Kup's action, and the appellants do not go so far. They contend, however, that it was wrong to put forward the defence which failed, that of fraud and collusion. I do not agree. I think that the respondents adopted a perfectly reasonable course in raising that defence and, although they could not prove complicity in Tan Kup, it may yet be found that the appellants acted fraudulently, or at least in breach of their duty as partners. Tan Kup's claim was bad, and it was reasonable to adopt both methods of defence against it, particularly since the claim sprang from the highly equivocal act of Tan Ghee Chuan and he, so far from contesting the claim, was, as the respondents alleged, actively assisting the claimant. I therefore think that the order of Bostock Hill J. depriving the successful defendants of their costs of Suit No. 126 does not in any way indicate that they did less than their full duty from the point of view of the partnership.

There is no doubt that, but for their action, Tan Kup would have obtained an order for an enquiry as to damages, and practically no doubt that he would have obtained judgment for $4,246.50 and costs. The appellants were prepared to see the assets of the partnership diminished by that amount. It is contended for the appellants that they are entitled, by reason of their refusal to defend, both to throw the whole cost of the defence on the respondents and to take the benefit of the respondents' defence by retaining their shares of the assets saved. This would on the face of it be grossly inequitable. If Tan Kup's claim had succeeded, the partners who refused to defend could no doubt decline to bear any share of the additional costs which would fall on partnership in consequence of the defence, and would be entitled, if those costs were recovered from partnership assets, to be indemnified in respect thereof by the partners who defended. In such a case, the defence is an improper course of action resulting in loss to the partnership and it is just that any partner who has refused to countenance such action should not be damnified thereby. The case is wholly different, when the defence succeeds and partnership assets are thus preserved. The defence is then a proper course of action. If the cost of defending is less than the amount which the plaintiff would have recovered, there is a clear benefit to the partnership. Even if the defence costs more than the plaintiff would have recovered, which may well be the case here, it cannot

prima facie be supposed that it was improper to defend, and loss to the partnership is limited to the amount of the excess. The order of Jobling J. excluded any such excess, and it is therefore not necessary to consider whether in some circumstances it might be recoverable by the successful defender.

In *Lindley* on Partnership, 10th edition, at p. 344 the following passage occurs :—

"A partner may sue in the name of himself and co-partners without their consent; but if he sues against their consent, he must in the absence of special circumstances indemnify them against the costs. If, in the course of such an action, the co-partners refuse to obey an order made upon the firm as plaintiffs, e.g. an order for a further and better affidavit of documents, he may apply to the Court for their attachment. A managing partner has implied authority to employ a solicitor to defend an action brought against the firm and to enter appearance for all the partners in their individual names. And it is apprehended that where there is no managing partner any partner may defend an action brought against the firm, indemnifying the firm against the consequences of so doing, if he acts against the will of the other partners."

If the two sentences underlined mean only that the partner suing or defending must ensure that the inactive partner is put in no worse position than he would have been in, had the action not been brought or defended, as the case may be, I respectfully agree with the learned author. In that case, they in no way help the appellants, for, as their counsel very properly conceded, they are no worse off than they would have been if the action had not been defended. If, on the other hand, as the appellants contend, the passage means that, however great a sum may be recovered or preserved for the partnership by the action of one partner, he alone must bear the costs of recovering or preserving it, I consider that it is not supported by authority, is inherently unreasonable and is wrong. I have no doubt whatever that the passage does not bear that meaning, but the former one, and the authorities cited by the learned author tend only to support this view and not to oppose it.

Whether the matter be considered on the basis that preservation of the partnership assets is a positive duty on a partner, and that he is entitled to receive from the partnership his expenses of performing that duty, or on the basis of salvage, creating a quasi-contractual right to recover the expenses of such salvage up to the value of the property preserved, I am satisfied that the respondents were entitled to receive the sum awarded to them by the order appealed from. For these reasons, and for the reasons given by Jobling J., with which I respectfully agree, I would dismiss this appeal with costs. The costs should include any costs of that part of the appeal which was abandoned before the hearing.

Willan, C. J. : — I have read the Judgment of Briggs J. I agree with it and have nothing to add.

Spenser-Wilkinson, J. : — I agree and have nothing to add.

Appeal dismissed.

JOHN HENRY PONNAMPALAM v. NG TEONG KIAT RUBBER WORKS.

[Orig. Civ. Juris. (Willan, C. J.) March 14, 1950]

[K.L. — Originating Summons No. 14 of 1950]

Titles to Land (Occupation Period) Ordinance No. 39 of 1949, s. 27 — Procedure to be followed in proceedings under section 27 of the Ordinance — Civil Procedure Code, F.M.S., s. 472.

In this Originating Summons the applicant applied by way of Originating Summons under s. 27 of the Titles to Land (Occupation Period) Ordinance, 1949, for an order that a memorandum of transfer dated the 30th day of July 2603, made during the Japanese occupation be set aside on the ground that it was procured by coercion or duress.

Held, that proceedings under section 27 of the Titles to Land (Occupation Period) Ordinance, 1949, should be commenced by means of a suit as the use of the phrase "suit, action or other proceeding" in the section indicates that it is a suit which must be instituted and also because a suit is the only appropriate method for deciding a disputed question of fact.

ORIGINATING SUMMONS.

R. Ramani for the applicant.

T. Rajendra for the respondents.

Willan, C. J. : — The applicant applied by way of originating summons under section 27 of the Titles to Land (Occupation Period) Ordinance, 1949, (hereinafter in this judgment referred to as "the Ordinance") for an order that a memorandum of transfer dated the 30th day of July, 2603, made during the Japanese occupation, be set aside on the ground that it was procured by coercion or duress.

This matter came before me in Chambers on the 13th March, 1950, and both Mr. Ramani, Counsel for the applicant, and Mr. Rajendra, Counsel for the respondents, asked that I should give a written judgment indicating the procedure to be followed with regard to proceedings brought under section 27 of the Ordinance.

Sub-section (2) of section 27 reads :—

"Notwithstanding anything to the contrary contained in any written law, the Courts to exercise jurisdiction in any suit, action or other proceeding (in this section referred to as a 'suit') brought to set aside an instrument or the registration of an instrument executed or effected